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Supreme Court of the United States

October Term, 1976

No. 76-297

LEE A. TURZILLO, and
LEE TURZILLO CONTRACTING COMPANY,
Petitioners,

vs.

P. & Z. MERGENTIME,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

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Now come petitioners and pray that the Court issue its writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in Causes Nos. 75-1079 and 75-1080 on the docket of that court.

OPINIONS

The opinion of the Court of Appeals for the District of Columbia Circuit (by Circuit Judge Leventhal, with Circuit Judge McGowan and District Judge Albert V. Bryan, Jr., concurring) is reported in 532 F.2d 1393 and is reproduced in the Appendix hereto, printed under separate cover, at page A1.

The opinion of Judge Leventhal upon rehearing is reported in 532 F.2d 1402, and is reproduced in the Appendix hereto, separately printed at page A19.

The opinion of the United States District Court for the District of Columbia, Judge Flannery, is not reported, but appears in the Appendix hereto, separately printed, at page A25.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was dated, and was entered, April 8, 1976; the order on rehearing was dated and entered June 2, 1976.

This Court has jurisdiction to review under 28 U.S.C. 1254(1) and 2101(c).

The district court had jurisdiction under 28 U.S.C. 1338(a).

QUESTIONS PRESENTED

This case brings here the questions:

1. Whether, in a patent case, as in any other, a Court of Appeals is obligated to accept the trial court's findings of fact when it is unable to adjudge them "clearly erroneous."

2. Whether a Court of Appeals

   (a) that accepts the trial court's findings of fact that "as early as 1956 [12 years before the patent in suit], those in the trade had all the elements available to them" to achieve the objectives of the patent in suit, but were unable to achieve those results by "using then known methods," and that the patent "eliminated a technical block in the practical implementation of the prior art,"

   (b) without adjudging any findings of fact "clearly erroneous," and

   (c) declaring "We are not holding the * * * patent invalid,"

   may, nevertheless, vacate the trial court's judgment that the patent is valid, without remanding the case to the trial court for further consideration.

3. Whether a Court of Appeals that finds itself unable to adjudge a patent invalid, and that accepts the trial court's findings of fact, that:

   (a) a prior art patent not cited to the Patent Office "is no better than the art considered and rejected by the Patent Office," and

   (b) the Patent Office examiner "had all of the most pertinent art before him,"

   may (on the ground the prior patent should have been cited to the Patent Office "coupled with an explanation as to why it does not constitute anticipation") vacate the trial court's judgment that the patent is valid without remanding the case to the trial court.

STATUTES AND RULE INVOLVED

Statutes:

35 U.S.C. 101. Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. July 19, 1952, c. 950, § 1, 66 Stat. 797.

35 U.S.C. 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other. July 19, 1952, c. 950, § 1, 66 Stat. 797.

35 U.S.C. 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented

and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. July 19, 1952, c. 950, § 1, 66 Stat. 798.

35 U.S.C. 131. Examination of application

The Commissioner shall cause an examination to be made of the application and the alleged new invention; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefor. July 19, 1952, c. 950, § 1, 66 Stat. 801.

35 U.S.C. 271. Infringement of patent

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason

of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement. July 19, 1952, c. 950, § 1, 66 Stat. 811.

35 U.S.C. 282. Presumption of validity; defenses

A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it.

The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement or unenforceability,

(2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,

(3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title,

(4) Any other fact or act made a defense by this title.

In actions involving the validity or infringement of a patent the party asserting invalidity or noninfringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty

days before the trial, of the country, number, date, and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit or, except in actions in the United States Court of Claims, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires. July 19, 1952, c. 950, § 1, 66 Stat. 812, amended July 24, 1965, Pub.L. 89-83, § 10, 79 Stat. 261.

35 U.S.C. 283. Injunction

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable. July 19, 1952, c. 950, § 1, 66 Stat. 812.

Federal Rules of Civil Procedure:

Rule 52. Findings by the court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the cred-

ibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). * * * As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

STATEMENT OF CASE

This case brings to the Court two patents, *viz.*:

No. 3,363,422, of which Lee Turzillo, petitioner here, is the inventor, applied for on March 19, 1965, and issued January 16, 1968. It covers a method and apparatus for anchoring a tie-down bar used in the construction of footings, as for example, in building skyscrapers and other structures, and in anchoring earth walls to prevent cave-ins during construction. The tie-down bar, a long, steel-reinforced concrete pin (which may be as much as 80 feet in length and 4 to 16 inches in diameter) can be sunk into the perpendicular wall left when entrenchments are made, at an angle of, say 45° or so (much like a picture hanger driven into the wall) to hold planking in place to prevent the earth wall from collapsing.

No. 3,464,216, of which Lee Turzillo, petitioner here, is also the inventor, applied for on January 8, 1968, issued September 2, 1969. It covers a method and means for forming cast-in-place reinforced concrete piles, an improvement on the earlier patent, also used in forming footings in the construction of large structures.

Under both patents the hole is dug by an auger (as if for a fence post, only deeper) and concrete is fed in as the

auger is withdrawn, leaving a solidified concrete pin reinforced by a steel rod or rods or cables centered in the pile.

The infringement complained of occurred in the District of Columbia in the construction of the Washington Metropolitan Area Transit Authority's Operations Center at 5th and G Streets, N.W., and in the construction of the National Gallery of Art and the Union Station branch of the new District of Columbia subway system. (A2.)

The district court held the tie-down patent valid but not infringed and the concrete pile patent valid and infringed. (A2-3.)

The Court of Appeals, without finding any of the trial court's fact findings "clearly erroneous," vacated the judgment that the tie-down patent is valid, and, without remanding the case to the trial court, merely said, "We are *not* holding the '422 [tie-down] patent invalid."* As to the other patent, the Court of Appeals, "on the ground of obviousness" (A17), reversed the trial court's judgment that the patent is valid.

The trial court found:

> "as early as 1956 [12 years before the tie-down patent], those in the trade had all the elements available to them to form tension piles in the manner of Turzillo [tie-down patent] '422. Yet, for one reason or another, tension piles could not be formed efficiently using these known methods. The testimony of Mr. Turzillo and Mr. Liver, an officer of the Turzillo Company, showed that in the mid-sixties Intrusion Prepakt was still using the Patterson method of first forming the pile and then manually inserting the steel tendon into the formed pile. However, this method could not produce the desired results and in at least one tie back job done for the Gulf Power Company in Louisiana Intrusion Prepakt was replaced by Tur-

* Emphasis supplied throughout.

zillo's company. Intrusion Prepakt now holds licenses under both the [tie-down] '422 and the [concrete pile] '216 patents. Indeed, defendant's first attempt to construct tie backs under their contracts in Washington was to use the even older percussion method of driving pipes into the ground and manually inserting the reinforcing bar after drilling. This method, however, resulted in too many failures. Defendants then switched to the methods now accused of infringement and thereafter had no test failures after the pile was formed." (A5-6, 31.)

The Court of Appeals ruled: "As to such findings [*i.e.*, those above quoted] we see no reason for appellate intervention." (A6.)

The Court of Appeals did not hold *any* finding of fact "clearly erroneous." Instead, it dealt with the case as if it were the trial court, free to announce its own judgment without regard to the findings of fact.

The turning point in the Court of Appeals was that the Phares patent (No. 3,200,599 of August 17, 1965) "was not called to the attention of the patent examiner." (A6.) As to this patent, the trial court, in findings the Court of Appeals did not hold "clearly erroneous," found:

> "the Phares device has never been successfully used commercially in the United States" (A9) and
>
> "Phares is no better than the art considered and rejected by the Patent Office * * *." (A9.)

The Court of Appeals did not hold these findings "clearly erroneous." Instead the Court of Appeals announced the mistaken view that:

> "even one prior art reference not cited to the examiner overcomes the presumption" [of validity] (A11)

and adopted the surprising rule that there is a duty to disclose to the Patent Office "matters that are relevant *even though* the applicant feels they do not establish anticipation" (A12) coupled "with an explanation as to why it does not constitute anticipation." (A12.)

If this is the law then the patent system, which many believe is the basis of American industrial strength, is in deep trouble. Under the rule the Court of Appeals applied, the applicant for a patent will have to swamp the Patent Office by citing every patent known to him, even when it "is no better than the art considered and rejected by the Patent Office." (A9.)

REASONS FOR ALLOWANCE OF WRIT

1. It is not the job of a Court of Appeals in a patent case, or any other, to retry the facts. A Court of Appeals is obligated to accept the facts as found by the trial court unless the Court of Appeals is prepared to adjudge them "clearly erroneous." If Courts of Appeals, as here, retry cases as if they were the court of first instance, the only result will be to further clog appellate dockets already so heavily burdened as to threaten the whole system of appellate review.

As Charles Allen Wright has pointed out in his perceptive discussion, *The Doubtful Omniscience of Appellate Courts*, 41 MINNESOTA LAW REVIEW 751, retrial of the facts by appellate courts serves only to breed more appeals:

> "Such a course impairs the confidence of litigants and the public in the decisions of the trial courts, *and it multiplies the number of appeals.* Until recently if a defendant thought an award of damages was excessive, he nevertheless had no choice but to pay it, for no appellate court would listen to his attack on it. Now, in similar circumstances, he will appeal. * * * We need not worry too much that an increase in appeals will mean overwork for appellate judges; they,

after all, have invited the increase. But we should worry about the consequences of more numerous appeals for the litigants and the public. * * * It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should set on a course *which inevitably must increase congestion and delay.*" 41 MINNESOTA LAW REVIEW at 779-780.

Professor Wright adds:

"it may well be, as *Blackstone* says, that 'next to doing right, the great object in the administration of public justice should be to give public satisfaction.' It is hard to believe that there has been any great public dissatisfaction with the restricted appellate review which was traditional in this country. Very early in our history Chief Justice Ellsworth [in *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 320, 329 (1796)] observed:

> 'But surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his case two or three times over.'

Yet increased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired. Under any feasible or conceivable system, our trial courts must always have the last word in the great bulk of cases. I doubt whether there will be much satisfaction with the judgments of trial courts among a public which is educated to believe that only appellate judges are trustworthy ministers of justice.

Finally, to come to the very heart of the issue, is there any reason to suppose that the result an appellate court reaches on the kinds of issues discussed is more likely to be 'just' than was the opposite result reached by the trial court? Judge Chase's observation, quoted earlier [in *Orvis v. Higgins*, 180 F.2d 537, 542 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950)], is in point here:

> 'Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.'" 41 MINNESOTA LAW REVIEW at 780-781.

It is high time, and here is the opportunity, for this Court to adopt for appeals generally, as it did for tax cases, a *Dobson* rule. The rule in tax cases is that on appeals from the Tax Court the courts are not to retry accounting facts. *Dobson v. Commissioner of Internal Revenue* (1943), 320 U.S. 489. Mr. Justice Jackson, referring to the Tax Court, put it this way:

> "It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than the judiciary." 320 U.S. at 498.

The Justice pointed out that upon review:

> "conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law." 320 U.S. at 499.

The Court thereupon laid down the rule (which might well be applied not only to patent cases but to appealed cases generally) that the decision under review:

> "of course, must have 'warrant in the record' and a reasonable basis in the law. But the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" 320 U.S. at 501.

In short, Courts of Appeals should be told they are not to retry the facts. They have two tasks: (a) to determine whether findings are "clearly erroneous," and if not,

abide by them, and (b) to determine whether the law has been correctly applied to those facts.

This will not solve the whole problem of appellate court congestion. But it will help.

Here is a way to curb the flood by cutting down the flow—the solution Judge Friendly has suggested for congested appellate dockets. 59 COLUMBIA LAW REVIEW 634.

2. A Court of Appeals that, as here, is unable to hold the trial court's findings "clearly erroneous" and unable to hold the patent invalid, is not entitled to vacate the trial court's judgment, or to do so without remanding the case to the trial court. Courts of Appeals should be told they are not authorized to re-try cases or to leave appeals in a state of "unfinished business."

3. The rule the Court of Appeals adopted, obligating the patentee to cite non-anticipating art to the Patent Office, will bring the examination of patents to a grinding halt. More than a dozen years ago the Commissioner of Patents proposed to amend Patent Office Rule 104 to *require* the applicant for a patent to list "the published art * * * known to him at the time of the application, and believed by the applicant to be significantly pertinent to the claimed invention." FEDERAL REGISTER, July 24, 1963, p. 7513.

After public hearings, the Commissioner withdrew his proposed amendment. Instead the Commissioner *invited* applicants to supply citations "which in their opinion may be helpful to the Office in its examination of the application." 797 PATENT OFFICE GAZETTE 733.

The result was that the Patent Office *was engulfed by citations* to the point where the Commissioner complained that citations of prior art:

> "in some instances have comprised lists of more than 50 patents * * *." 805 PATENT OFFICE GAZETTE 294.

The Commissioner said such lists "are not helpful" and suggested citations be limited to 10. 805 PATENT OFFICE GAZETTE 294. Even this proved too much and the Commissioner reduced the number to *five* "unless a satisfactory explanation is given as to why more than five citations are necessary * * *." MANUAL OF PATENT EXAMINING PROCEDURE, § 707.05(b), added by Revision 13 of July 1967. The Commissioner in that amendment explained that the responsibility for examining the application rests with the Patent Office under 35 U.S.C. 131; all he wanted was a few citations to give the examiner a fast start.

The latest revision of §707.05(b), added by Revision No. 48 of April, 1976, does not specify the number of citations to be applied, but does say in §707.05(b)(2)(c) that:

> "Submitted citations will not in any way diminish the obligation of examiners to conduct independent prior art searches,"

and that:

> "applicant has the responsibility of determining whether or not such material is sufficiently relevant to the claimed invention * * *."

The rule the Court of Appeals adopted is in the face of unreversed findings by the trial court that the patent examiner "had all of the most pertinent art before him" (A7) and that the matter omitted "is no better than the art considered and rejected by the Patent Office * * *." (A9.)

The rule the Court of Appeals imposed has in it the very vice this Court condemned in *TSC Industries, Inc. v. Northway, Inc.* ____ U.S. ____, decided June 14, 1976, with respect to disclosures required under S.E.C. Rules in Proxy statements. This Court ruled:

> "if the standard of materiality [of information that must be disclosed] is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability [or, in patent cases, to the loss of its patent] may cause it simply *to bury the shareholder in an avalanche of trivial information*—a result that is hardly conducive to informed decision making."

For precisely this reason the rule the Court of Appeals has fashioned serves ill the patentee, the Patent Office, and the public.

Moreover, the rule strips the applicant for a patent of the discretion he is directed to exercise to determine the substantive content of uncited art vis-a-vis the content of the art cited by the examiner to determine whether such uncited art should be drawn to the attention of the examiner as relevant. Such rule is in direct conflict with the rule in other circuits as reflected by the holding of the Fifth Circuit in *Eli Lilly and Company, Inc. v. Generix Drug Sales, Inc.* (Fifth Circuit, 1972), 460 F.2d 1096:

> "The trial court found that Dr. Pohland did not consider the Chen compound a relevant prior disclosure. * * * Since, if he had called it to the examiner's attention he would have made the undisputable assertion that it lacked the essential value of propoxyphene, we cannot say its nondisclosure violated any basic concept of doing equity. * * * Without in the least undermining *Beckman's* [439 F.2d 1369] mandate to leave to the patent office such decisions as it is able to make concerning the effect of prior art, we hold that while this rule requires no less than full, frank disclosure, it does not mean an applicant must list out the full spectrum of his knowledge to establish bona fides." 460 F.2d 1102-1103.

CONCLUSION

The case presents substantial questions of importance to the patent system and to the appellate process in general that merit the attention of this Court.

Respectfully submitted,

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